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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

November 4, 2013

2:13 PM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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(CC: Doc# 5555) Motion for Leave to Attend and Observe Expert  
Depositions Related to Plan Confirmation.

Pre-Trial Conference Regarding Plan Objections.

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1 P R O C E E D I N G S

2 THE COURT: All right. Residential Capital, number  
3 12-12020.

4 (Pause)

5 THE COURT: So before we get into a discussion of  
6 where things stand in relation to confirmation, I have MBIA's  
7 motion to attend and observe depositions. Were there any  
8 objections to that motion? I didn't see any?

9 MR. LEE: We didn't see any, Your Honor.

10 THE COURT: All right, the motion is granted.

11 MR. LEE: Okay. Do I have a written order on that?  
12 Do I have a disk?

13 UNIDENTIFIED SPEAKER: Your Honor, I think a Word  
14 file --

15 THE COURT: Either that or e-mail -- I'll let you  
16 e-mail a copy of the order. But the motion is granted and I so  
17 order it on the record. So feel free to attend depositions.

18 All right. Go ahead, Mr. Lee.

19 MR. LEE: So, good afternoon, Your Honor. I think at  
20 the conclusion of the phase 1 JSN trial, Your Honor --

21 THE COURT: Have we concluded? I thought we have  
22 closing arguments --

23 MR. LEE: Well, it was the conclusion --

24 THE COURT: -- this week.

25 MR. LEE: -- of the last conclusion. And there'll be

1 another conclusion after confirmation.

2 THE COURT: Well, there'll be a -- I'm hearing closing  
3 argument on Wednesday, so it's not even --

4 MR. LEE: It's concluded as to the record.

5 THE COURT: And I'm immersed in proposed findings of  
6 fact and trial briefs.

7 MR. LEE: Well --

8 THE COURT: So you may think it's concluded.

9 MR. LEE: Your Honor, I was going to stand up today  
10 and --

11 THE COURT: Unless you're telling me it's been  
12 settled, Your Honor.

13 MR. LEE: Absolutely, Your Honor. Yes. And a pig  
14 just flew by.

15 Actually, Your Honor, today is about paper reduction,  
16 or at least reading time reduction for Your Honor, because I  
17 think I understood at the last -- when we were last here, that  
18 Your Honor would like to get an update on where we are with  
19 respect to resolving confirmation objections and what we expect  
20 will be going forward on November the 19th.

21 And unfortunately, Your Honor, there has been a lot of  
22 paper filed in this case, and there will undoubtedly be more  
23 before we get to confirmation, and much of that will be,  
24 unfortunately, also generated in connection with the Junior  
25 Secured Noteholders. However, since May we, the debtors and

1 the committee, have made, I think, quite remarkable progress in  
2 resolving most of the objections that have been filed to date  
3 in relation to confirmation. And more importantly, and this is  
4 something that I wanted to go through with Your Honor, we've  
5 also resolved a number of what would have been objections to  
6 confirmation, but for the fact that we have resolved them. And  
7 in that regard I'd just like to say that committee counsel  
8 deserves significant credit, because there have been a number  
9 of consensual resolutions that I want to go through with Your  
10 Honor today -- this afternoon.

11 So, as I said, my objective, Your Honor, is to try to  
12 at least reduce the amount that you have to read in connection  
13 with the confirmation hearing, even though, as I think you  
14 remarked, there's still a lot of paper. And if we resolve any  
15 more confirmation objections, we'll obviously let you know.

16 We think that by the time we get to confirmation, the  
17 only objections that will be left fall into four categories.  
18 The first is the junior secured noteholder/ad hoc/trustee  
19 objections, and one objection that relates to their objection  
20 filed by Wells Fargo. The second is the very limited objection  
21 that was filed by the U.S. Trustee's Office. The third is a  
22 handful of borrower objections, not all of which go to  
23 confirmation. And the last is a handful of miscellaneous  
24 objections that object, in one instance to the insurance  
25 neutrality provisions in the plan; in some cases appear to be

1 based on misunderstanding of third-party releases, or have no  
2 bearing whatsoever on confirmation.

3 So in other words, I think that what we'll be going  
4 into confirmation, Your Honor, is with a remarkable degree of  
5 consensus for confirmation, close to unanimity.

6 What I've done, Your Honor, is we've prepared a chart  
7 listing the status of the various plan objections, which I'd  
8 like to hand up right now, if I may?

9 THE COURT: Please. Be careful, Mr. Lee.

10 Thank you.

11 (Pause)

12 MR. LEE: So first, Your Honor, what I'd like to do is  
13 go through the objections that have been resolved or avoided  
14 altogether or that we think will be resolved prior to  
15 confirmation, and then I'll take up the relatively few  
16 objections that are remaining. And then I will turn the podium  
17 over either to committee counsel -- Mr. Kerr, to actually talk  
18 about the hearing itself and what progress we've made in  
19 getting organized for that.

20 So as Your Honor will recall, when we filed the plan  
21 support agreement back in May, it resolved the treatment of  
22 approximately 1,100 claims, representing 38 billion dollars in  
23 liabilities asserted against the debtor. And when we brought  
24 that global settlement to you, we promised to try to  
25 consensually fold everyone into the global settlement, using



1 exactly the same template that we used for the global  
2 settlement; in other words, that we would provide the same  
3 treatment to each of the claims that we folded in; that we  
4 wouldn't try and provide any form of disparate treatment to  
5 those creditors.

6 And at that time, there were approximately 6,000 more  
7 claims that had not yet been addressed. A number of parties  
8 filed objections to the plan support agreement or the  
9 disclosure statement or, in fact, in connection with  
10 confirmation, seeking really clarity regarding the treatment of  
11 their claims in the form of objections.

12 And but for the fact that we have largely been able to  
13 resolve all of those claims, each of those claimants would have  
14 come here asking for an evidentiary hearing on their claims.  
15 And but for the resolutions that I'm going to describe, they  
16 would have shown up for a confirmation hearing, making a six-  
17 day hearing somewhat untenable.

18 The resolutions that I'm going to take Your Honor  
19 through are tied to plan confirmation in large part. I think  
20 there are a couple of exceptions. So looking at part A of the  
21 chart, it lists parties who objected to one or more of the plan  
22 support agreement, the disclosure statement, or to  
23 confirmation. And as I said, we've been engaging with each of  
24 these parties over the last five months.

25 So if I may, the first group that's listed here are

1 objections filed by three of the monolines. And those are  
2 Ambac, Assured, and Syncora, who collectively, between the  
3 three of them, asserted about 1.3 billion-dollars'-worth of  
4 claims. And none of those parties, Your Honor, were part of  
5 the mediation process.

6 We've reached agreement with Ambac and with Assured,  
7 and an agreement in principle with Syncora. With respect to  
8 Ambac, it's receiving, in effect, the treatment that it would  
9 receive as one of the other monoline settling parties, on the  
10 same basis. So it will be receiving an allowed claim of 207  
11 million dollars against the GMAC debtors and 22.8 million  
12 dollars against the RFC debtors. And Assured is receiving  
13 allowed claims of approximately 88.9 million dollars against  
14 the GMAC debtors and 58 million against the RFC debtors. So  
15 fitting in exactly with the other monolines.

16 Syncora filed an objection to confirmation which is  
17 docketed at 5418. As Your Honor will no doubt recall, Syncora  
18 and the debtors have been engaged in a fairly long-running  
19 battle throughout these cases, in fact, from inception. And as  
20 I said, we're very pleased to report that the plan proponents  
21 have finally been able to reach an agreement in principle with  
22 Syncora, and we're working to finalize a stipulation that we'll  
23 submit to the Court prior to confirmation. And I'd like to,  
24 again, give my thanks to the creditors' committee for really  
25 endeavoring to achieve that result.

1           So that, Your Honor, in fact, resolves the monoline  
2 objections in full.

3           THE COURT: Okay.

4           MR. LEE: The next category, Your Honor, are borrower  
5 claimants, specifically, the Rothstein plaintiffs and the Moore  
6 plaintiffs, who are referring to themselves as the RESPA  
7 plaintiffs in the objections that they filed. As Your Honor  
8 may recall, Rothstein is a putative class action pending in the  
9 Southern District of New York. They've also been engaged in  
10 fairly extensive motion practice in this case. That action  
11 related to lender forced-place insurance. The plaintiffs  
12 valued that claim at I think approximately a billion dollars.  
13 It was a putative nationwide class with hundreds of thousands  
14 of members. And we have reached a settlement in principle with  
15 Rothstein, and we're working to finalize that now.

16           THE COURT: Are there other defendants in the case  
17 pending in the district court?

18           MR. LEE: I believe it's Balboa Insurance is a  
19 co-defendant.

20           THE COURT: And has the case been completely resolved  
21 or -- and is district court approving going to be required as  
22 well as -- I understand the claims against the debtors, but  
23 will the case remain against Balboa?

24           MR. LEE: Your Honor, I'll confirm that, and I'll make  
25 sure that we come back to you prior to the next status

1 conference on that, but I believe that it will not require  
2 district court approval. It's just going to be resolved in the  
3 context of the Chapter 11.

4 THE COURT: Okay.

5 MR. LEE: The --

6 THE COURT: Is that --

7 MR. LEE: Sorry, Your Honor.

8 THE COURT: -- am I remembering correctly that Balboa  
9 did not file a proof of claim in this case?

10 MR. LEE: That's correct, Your Honor.

11 THE COURT: Okay.

12 MR. LEE: The pleading that was filed by the RESPA  
13 plaintiffs in connection with confirmation is at docket number  
14 5457. And that was a reservation of rights. And the  
15 reservation effectively is just there just to make sure that we  
16 actually get the settlement in principle finalized.

17 And under the settlement, the RESPA plaintiffs are  
18 receiving a payment from a nondebtor, CapRe of Vermont. So  
19 they're not sharing in the borrower trust under the plan.

20 That brings us to the next set of objections, those  
21 that were filed by securities claimants. Going back now to  
22 July -- the end of July, I think Your Honor, at least in  
23 connection with NCUAB, had encouraged the parties to resolve  
24 the claims through a settlement. And we have reached a  
25 settlement with NCUAB that resolves the 290-million-dollars'-

1 worth of claims that they filed against the debtors as well as  
2 the 390 million dollars in claims against AFI and 200 million  
3 dollars against other AFI affiliates.

4 And we filed a motion seeking approval of that  
5 settlement on October the 28th. The objection deadline, I  
6 believe, is next week.

7 THE COURT: Is that case resolved in its entirety? In  
8 other words, are the claims against AFI resolved as well?

9 MR. LEE: Yes, Your Honor.

10 The parties that filed the next four objections listed  
11 on the chart are Huntington Bank Shares, Federal Home Loan  
12 Banks of Chicago, Boston and Indianapolis, the Union Central  
13 parties, and Cambridge Place. And I'm pleased to report, Your  
14 Honor, that each of those four parties have joined into the  
15 private securities settlement that's provided for under the  
16 plan.

17 So in other words, they've agreed to fall into the  
18 same template as the four parties that were part of the  
19 mediation.

20 THE COURT: This is -- the Carpenters case is  
21 separate?

22 MR. LEE: This is separate from the Carpenters case,  
23 Your Honor.

24 THE COURT: Okay. All right.

25 MR. LEE: So, in essence, there were twenty private-

1 label securities lawsuits or tolling agreements with twenty  
2 parties, and one of our objectives has been to get all twenty  
3 of them within the same rubric as the initial four who were in  
4 the mediation. And with respect to these four, and as I'll  
5 report, with respect to all of the twenty, they've all  
6 effectively agreed to the same plan treatment and the structure  
7 provided under the private securities settlement.

8 So actually, Your Honor, so now turning to New Jersey  
9 Carpenters. I think Your Honor knows, we've settled the  
10 pending class action --

11 THE COURT: Yeah, and I saw Judge Baer approved the  
12 class action settlement.

13 MR. LEE: And that, Your Honor, resolves fifty-nine  
14 different RMBS securities offerings with a face value of  
15 thirty-eight billion dollars. And approval of that settlement  
16 is being sought, obviously, Your Honor, in connection with plan  
17 confirmation. So --

18 THE COURT: Okay, so --

19 MR. LEE: -- a lot of things riding on it.

20 THE COURT: -- it required both the approval of the  
21 district court, which has been obtained. Were there any  
22 objections in the district court? Mr. Etkin, were there any --  
23 you can just -- it's Michael Etkin from -- just tell me from  
24 there, okay.

25 MR. ETKIN: Your Honor, there was an objection filed

1 in connection with the judgment reduction language in the  
2 settlement agreement before Judge Baer. That was resolved in  
3 advance of the final hearing by virtue of some language  
4 changes.

5 THE COURT: Has that judgment become final yet?

6 MR. ETKIN: It will likely become final, Your Honor,  
7 the latter part of this week --

8 THE COURT: Okay.

9 MR. ETKIN: -- or the beginning of next week.

10 THE COURT: Thank you, Mr. Etkin.

11 Go ahead, Mr. Lee.

12 MR. LEE: Your Honor, the next set of objections are  
13 those that were filed by the various governmental agencies.  
14 The first, and I think this is really perhaps the most  
15 significant news to report is, that the FHFA as conservator for  
16 Freddie Mac, has been resolved under a settlement reached among  
17 FHFA, the debtors, and AFI, which AFI publicly reported in a  
18 Form 8-K that was filed at the end of last month. We will be  
19 filing a 9019 motion seeking approval of that settlement as  
20 part of plan confirmation.

21 Obviously, Your Honor, we're delighted. It's a very,  
22 very significant settlement for confirmation purposes. Your  
23 Honor had expressed some concerns relating to FHFA in prior  
24 hearings. We heard you --

25 THE COURT: Well, they were separate classified and --

1 do they remain -- is the plan being amended, or what is their  
2 classification?

3 MR. LEE: Your Honor, they will remain separately  
4 classified, but the plan will be amended to provide for an  
5 unsecured claim for FHFA that's entirely consistent with the  
6 treatment that's being provided to the other securities  
7 claimants.

8 THE COURT: Okay.

9 MR. LEE: And that, Your Honor, will resolve about  
10 six-billion-dollars'-worth of face value of securities claims.

11 THE COURT: Does the settlement -- assuming the  
12 settlement is approved, they agree to vote in favor of the  
13 plan?

14 MR. LEE: That's correct, Your Honor.

15 THE COURT: And can -- well FHFA and FDIC were carved  
16 out of the third-party nondebtor release. That remains the --  
17 I assume they've settled with AFI, so --

18 MR. LEE: The carve-out remains, Your Honor, yes.

19 THE COURT: Okay. All right.

20 MR. LEE: Next, I think, to the DOJ. Your Honor, the  
21 Department of Justice initially filed a reservation of rights  
22 with respect to the plan and filed reservations with respect to  
23 most substantive pleadings that have been filed in this case.  
24 There has been a very productive ongoing dialogue with the DOJ  
25 really from the outset of this case. And there is, I think,



1 substantial resolution of a number of the issues that the DOJ  
2 are most concerned with.

3 THE COURT: Including the release of Ally?

4 MR. LEE: Including the release of Ally and including  
5 the obligations under the DOJ-AG consent order, which I think  
6 is the principal one. And there will be a structure put in  
7 place that will come into the form of the amended plan when we  
8 file it, that addresses the obligations under the consent  
9 order.

10 It's our objective to resolve all of their concerns  
11 prior to confirmation. And I think we're on the right path.  
12 The DOJ's been very easy to deal with. We've made significant  
13 progress with respect to all of those issues. And we hope that  
14 we will resolve any of their objections.

15 They have not filed an objection, largely because the  
16 parties have been in very productive discussion, and our hope  
17 is that they don't, or to the extent that they do, it will be a  
18 very limited one.

19 THE COURT: Okay.

20 MR. LEE: The next objection -- and this was in  
21 relation to confirmation, Your Honor -- is 5415 on the docket.  
22 That was filed by thirty-two states and the District of  
23 Columbia, as party to the DOJ-AG consent order. And that  
24 objection seeks to make sure they can enforce any nonmonetary  
25 obligations under the consent judgment that remain after the

1 effective date. And that's precisely the structure of what we  
2 were intending to address with the Department of Justice, which  
3 is, in effect, put in place a structure so that there is  
4 comfort that the post-effective date obligations are met  
5 monetarily. And that will be the resolution that's ultimately  
6 folded into the plan.

7 The next three objections, Your Honor, were filed by  
8 taxing authorities. There's Nassau County, San Bernardino, and  
9 Los Angeles County. And they're basically seeking comfort on  
10 how their claims are going to get treated under the plan.

11 We have resolved the Nassau County claim for roughly  
12 56,000 dollars in property taxes. We did that prior to the  
13 disclosure statement. And subsequent to that, we've reached  
14 agreements in principle resolving San Bernardino's claim, which  
15 was for about 23,000 dollars in property taxes, and Los Angeles  
16 County's claim which is for about 100,000 in property tax  
17 claims. And we're working to finalize stipulations,  
18 formalizing each of those agreements. And we'll file all of  
19 those prior to confirmation.

20 The next set of objections were filed by RMBS  
21 claimants: Amherst, Monarch, and Stonehill. The Amherst  
22 objection was resolved by incorporating certain requested  
23 amendments to the RMBS trust mechanism under the plan, and  
24 obviously Monarch and Stonehill were disposed of by their  
25 withdrawal of the objection to the FGIC settlement.

1 That brings us to -- I think this was a question Your  
2 Honor had before about co-defendant and indemnity claimants.  
3 And I think this is another fairly significant resolution that  
4 heads us towards largely uncontested confirmation hearing.  
5 Your Honor will recall that we received two objections from  
6 co-defendants in securities litigation. I believe that was  
7 Citigroup, Deutsche Bank, Goldman Sachs, UBS, and Credit  
8 Suisse.

9 THE COURT: These were all co-defendants in the case  
10 before Judge Cote?

11 MR. LEE: In front of -- I think that's correct, Your  
12 Honor. Yeah.

13 THE COURT: All right. That AFI was a defendant. The  
14 complaint was amended to remove the debtors after the  
15 bankruptcy petition?

16 MR. LEE: Yeah. And it was -- Your Honor, it's  
17 actually, they are both co-defendants in that and in other --

18 THE COURT: Okay.

19 MR. LEE: -- in other lawsuits as well --

20 THE COURT: All right.

21 MR. LEE: -- Your Honor.

22 And those objections have been resolved through  
23 amendments to the judgment reduction provision under the plan.  
24 So they -- none of this group filed objections to confirmation  
25 based on the language that's been agreed.

1 THE COURT: And is the settlement -- does the  
2 settlement before Judge Cote require approval or -- I guess  
3 probably not?

4 MR. LEE: The FHFA settlement?

5 THE COURT: Yeah.

6 MR. LEE: Not that I'm aware of, Your Honor, no.

7 THE COURT: Okay. And was the judgment reduction  
8 provision incorporated in the judgment that settles the action  
9 before Judge Cote?

10 MR. LEE: Your Honor, I can discuss that with AFI.

11 THE COURT: Yeah.

12 MR. LEE: I -- as I said, we've reached an agreement.  
13 I'm not sure --

14 THE COURT: All right.

15 MR. LEE: -- what's been -- I don't think anything's  
16 been placed in front of Judge Cote at this time. One second.

17 Your Honor, I'm advised that it hasn't been resolved,  
18 but the likelihood is that the case will just be dismissed.

19 THE COURT: Okay, all right. Okay, go ahead.

20 MR. LEE: Your Honor, the final set of objections in  
21 the chart were filed by various creditors first --

22 THE COURT: Let me just -- Credit Suisse falls into  
23 that same category as the Citibank, Deutsche Bank, Goldman,  
24 UBS?

25 MR. LEE: That's correct, Your Honor.

1 THE COURT: Okay.

2 MR. LEE: The first claimant in this section is the  
3 objections filed by the PBGC with respect to the pension  
4 obligations of the debtors and Ally. After the PSA was  
5 approved, there have been a number of discussions with the  
6 PBGC, and we've resolved the treatment. I think it's about 153  
7 claims that they filed totaling approximately 10.3 billion  
8 dollars of claims. Those have been resolved by AFI agreeing to  
9 exclude obligations for the GMAC Mortgage Group pension plan  
10 and ERISA obligations. And so the PBGC obviously, did not file  
11 an objection to confirmation.

12 The next party on the list, Impac, I think that was a  
13 cure claim objection, Your Honor, filed objections to both the  
14 plan and disclosure statement regarding the treatment of their  
15 executory contracts under the plan. And we are in -- we're in  
16 settlement discussions with Impac. And if we're unable to  
17 reach an agreement prior to the adjourned hearing, which I  
18 think is November the 15th, on our motion to assume and assign  
19 that contract, then we'll prosecute the objection. And we  
20 think that the result of that objection will largely moot their  
21 claim.

22 The next objection which is 5404, was filed by Oracle  
23 America. They're seeking comfort language regarding the  
24 treatment of their software licenses under the plan. We're in  
25 discussions with Oracle, and we think that we'll be able to

1 resolve that objection prior to confirmation.

2 Docket num --

3 THE COURT: Just -- Ocwen was continuing to use the  
4 debtors' software, am I right? And we're going to be phasing  
5 that out --

6 MR. LEE: That's correct.

7 THE COURT: -- and moving the platform over to their  
8 own existing software.

9 MR. LEE: Sorry, Your Honor.

10 THE COURT: Come on up to the microphone. You have to  
11 identify yourself.

12 MR. DOSHI: Sorry, Your Honor. Amish Doshi, for the  
13 record, for Oracle America, Inc. Actually, there was a  
14 separate paragraph in the sale order that there's going to be  
15 no transfer, assumption and assignment of any Oracle agreements  
16 to Ocwen, and that to the extent any computers, et cetera, were  
17 being transferred, the software was going to be transferred.  
18 And if Ocwen works out of -- I believe there's a different  
19 arrangement, not in the bankruptcy, between Ocwen and Oracle,  
20 because there's other relationships. But with respect to the  
21 sale, there's specific language excepting out the transfer of  
22 the Oracle software.

23 THE COURT: Okay. Thank you very much.

24 MR. DOSHI: Thank you.

25 THE COURT: Go ahead, Mr. Lee.

1 MR. LEE: So PNC Mortgage, Your Honor, filed an  
2 objection to plan confirmation which was docket 5406. That  
3 objection relates to Ally Bank's obligations under various  
4 servicing agreements. That objection has been resolved, and it  
5 was withdrawn. I think that withdrawal is reflected on docket  
6 5578.

7 The final objection on the chart is 5461 from Ocwen.  
8 That requested clarifications and assurances regarding the  
9 treatment of their contracts after the effective date. I think  
10 we are very close to reaching agreement with Ocwen on language  
11 to be included in the confirmation order which addresses their  
12 objection.

13 THE COURT: Okay.

14 MR. LEE: Turning to page 11 of the chart, Your Honor,  
15 what I'm hoping to do here is to highlight some of the claims  
16 resolutions since the PSA hearing that we think have largely  
17 avoided the filing of confirmation objections altogether. And  
18 those are listed in part B, beginning on page 11. And again,  
19 most of these resolutions, if not all of them, are tied to plan  
20 confirmation.

21 The first set of parties in this section are the  
22 settling private securities claimants. And I think I  
23 addressed, Your Honor, that all twenty of the private  
24 securities claimants are now folded into the private securities  
25 trust. So we won't have any objections from that group.

1           The second set of claims in this section are the  
2 borrower class action claims that have been settled. And what,  
3 Your Honor, is reflected on here, is a number of class actions  
4 with at least damages claimed of in excess of 3.7 billion  
5 dollars. We've reached settlements with each of these  
6 plaintiffs groups, and that includes the Kessler group as well.

7           We are working to finalize agreements and 9019 motions  
8 with respect to each of these. I'm happy just to briefly  
9 describe what they are.

10           THE COURT: Are there nondebtor defendants in those  
11 actions? And I don't know whether those actions have been  
12 continuing in state or federal courts against the nondebtor  
13 defendants.

14           MR. LEE: There's a combination of both, Your Honor.  
15 But specifically, for example, taking the first one, which is  
16 Moore, which has a combination of both debtor and nondebtor  
17 defendants, effectively the economic contribution's going to  
18 come from CapRe of Vermont, which is a nondebtor, and that will  
19 effectively dispose of the case entirely.

20           THE COURT: Okay.

21           MR. LEE: So they're all listed here, Your Honor. I'm  
22 happy address each one of them, or just --

23           THE COURT: Let me ask this. Have any of the  
24 nondebtor defendants in those actions filed proofs of claim for  
25 indemnity or contribution in the Chapter 11 cases?



1 MR. LEE: I'm just going through my list, Your Honor.  
2 Just one second.

3 THE COURT: And if you can't answer that today,  
4 we'll --

5 MR. LEE: I will go back and check, Your Honor, for  
6 absolutely certainty. But I believe the answer is no. But I  
7 will confirm --

8 THE COURT: Okay.

9 MR. LEE: -- at the next status conference.

10 Turning now to page 12. It's the -- lists other  
11 significant claims that have been settled. The first is  
12 Bollinger, which was a fair labor standards and wage hour claim  
13 that's been resolved. West Virginia Investment Management  
14 Board, which is a --

15 THE COURT: When you say those have been resolved, am  
16 I going to get 9019 motions with respect to these?

17 MR. LEE: Your Honor, some of these are going to be  
18 through 9019s, but by and large, most of these are going to be  
19 funneled through the borrower trusts. So effectively, I think  
20 all of these -- all of these will be wound into the borrower  
21 trust.

22 THE COURT: Okay.

23 MR. LEE: So I'm not sure that any of these,  
24 potentially with the exception of Moore, will require a  
25 separate 9019.

1           So I was at West Virginia Investment Management Board.  
2   That's a seven-and-a-half-million-dollar securities claim  
3   against RFC and RALI, Rali. That claim has been settled for  
4   223,000 dollars, so again, within the rubric of the other  
5   securities settlements that have been reached in this case.

6           The Miller Johnson claims are 151 claims filed by  
7   holders of certificates in the debtors' RMBS securitizations  
8   with a face value of about 7.2 billion dollars. Pursuant to  
9   the terms of a stipulation that Your Honor approved in  
10   September -- I think it was at docket 5050 -- the claimants  
11   acknowledge that those claims were duplicative of the claims  
12   that the RMBS trustees have, and that they will be resolved  
13   through the RMBS trust settlement, provided the plan is  
14   confirmed.

15           We've also reached agreements in principle resolving  
16   RMBS claims filed by Lehman Brothers and Met Life, and similar  
17   to the Miller Johnson settlement, those will be expunged,  
18   provided the plan is confirmed. We will be finalizing  
19   stipulations to that effect.

20           So that, Your Honor, brings us to the unresolved plan  
21   objections, which are listed in part C of the chart, beginning  
22   on page 13.

23           And I think, given that I spent the first twelve pages  
24   talking about what we've actually resolved for a case this size  
25   and this complexity, it's remarkable how little we really have

1 left.

2 THE COURT: Why doesn't it seem that way to me?

3 MR. LEE: Because you didn't have to do the other  
4 twelve pages, Your Honor. I understand. I understand.

5 I think -- Your Honor, I think our promise was to try  
6 as hard as we could to get you a global consensus at  
7 confirmation. And I think what's left is really reflective of  
8 the fact that one party with whom we've been unable to reach  
9 agreement with is the same party that we've been unable to  
10 reach agreement with from -- for a while.

11 And as a result of Your Honor's efforts and the  
12 efforts of Judge Peck, the committee, and Mr. Kruger, what's  
13 left are the JSN objections; and everything else really relates  
14 to the scope of third-party releases and exculpation.

15 I'm not going to address the JSN position, arguments,  
16 or their place in this case. I think we'll address their  
17 objection fully at confirmation. I'm not sure it really makes  
18 any sense to get into any details --

19 THE COURT: It doesn't.

20 MR. LEE: -- here today.

21 I would note that we've included in the category of  
22 plan objections one that was filed by Wells Fargo, which is at  
23 docket 5410. And that's really an objection that arises out of  
24 the JSN objection to confirmation. I gather that Wells Fargo  
25 is concerned that the junior secured noteholders will sue them

1 in connection with collateral releases, and they want to  
2 preserve their rights to seek indemnity from the debtors  
3 notwithstanding the releases under the plan. And obviously,  
4 Your Honor, I don't anticipate that that objection is going to  
5 get resolved prior to confirmation.

6 The next unresolved plan objection is that that was  
7 filed by the U.S. Trustee's Office. Your Honor, we've been  
8 working for the past several months to address various concerns  
9 raised by the DOJ who hasn't objected. And obviously we've had  
10 discussions with the U.S. Trustee's Office.

11 The U.S. Trustee's objection relates to the third-  
12 party release and the exculpation provisions, and we'll be  
13 presenting arguments at confirmation addressing those. I think  
14 it's worth really previewing at least a couple of the sticking  
15 points on exculpation and the releases so that Your Honor  
16 understands what they are.

17 The U.S. Trustee's arguing, I think, that this court  
18 lacks jurisdiction to issue nondebtor releases for liabilities  
19 that relate to something other than property of the estate. I  
20 think Your Honor dispensed with that argument or at least a  
21 similar argument in MF Global, I think it may have been in  
22 March of April of this year. And we'll fully brief the issues  
23 relating to third-party releases and we'll put on our evidence  
24 at confirmation. But we think that we'll be able to show that  
25 this is the unique case that justifies it, and that we meet the

1 Metromedia standards.

2 And as to jurisdiction, I think Your Honor has already  
3 indicated --

4 THE COURT: I didn't rule. I raised -- but certainly  
5 we've had this discussion before. And as I understand it, AFI  
6 filed claims in the case for indemnification or contribution --  
7 I don't know precisely what they were -- and that the timely  
8 assertion of those proofs of claim would establish the basis  
9 for jurisdiction by this Court, because it would have an effect  
10 on the res of the estate. So that -- and I understand, Mr.  
11 Masumoto, you may contest that -- I'm not asking you to deal  
12 with that. But at least that's a comment I've made before, and  
13 it may be the U.S. Trustee will argue that there's some facts  
14 that distinguish the circumstance.

15 And then it became a Metrome -- assuming that the  
16 jurisdiction is satisfied, then it becomes the Metromedia test.

17 MR. LEE: And we will put on evidence at the  
18 confirmation relating to the substantial contributions made by  
19 AFI, both throughout the life of the case and in the form of  
20 the 2.1-billion-dollar settlement to address the Metromedia  
21 standards.

22 THE COURT: May I ask this? What parties-in-interest,  
23 other than the UST, are objecting to the third-party nondebtor  
24 releases?

25 MR. LEE: With the exception of the junior secured

1 noteholders?

2 THE COURT: Well, did they -- have they objected? It  
3 wasn't clear to me they were objecting to the third-party  
4 releases. Did they?

5 MR. LEE: I be -- yeah, as it applies to their claims,  
6 that's correct, Your Honor.

7 THE COURT: Okay.

8 MR. LEE: And then with respect to the DOJ, we  
9 obviously have a carve-out, so --

10 THE COURT: Right.

11 MR. LEE: -- there's no need for them to object. And  
12 reviewing the rest of the objections, there's an objection  
13 which was a late-filed objection at docket number 5422 by an R.  
14 Flinn, which --

15 THE COURT: Where do I find that?

16 MR. LEE: That is on page 16, Your Honor. I believe  
17 that's the other one.

18 THE COURT: Has --

19 MR. GRAHAM: Your Honor? Excuse me, Your Honor.

20 THE COURT: Come up to the microphone if you want to  
21 speak.

22 MR. GRAHAM: Good afternoon, Your Honor. Chris Graham  
23 of McKenna Long for Impac Funding Corporation. We have also  
24 raised an objection about the jurisdiction of the Court to  
25 enter the third-party releases. And I'll be happy to address

1 that when Mr. Lee concludes.

2 THE COURT: Okay.

3 MR. GRAHAM: It's on page, 9, Your Honor, of the  
4 debtors' chart, right at the top. The last bullet point: "The  
5 bankruptcy court lacks jurisdiction to approve the third-party  
6 releases."

7 THE COURT: Okay.

8 MR. GRAHAM: We have two other objections.

9 THE COURT: Are you as optimistic as Mr. Lee that  
10 you'll be able to resolve Impac's objections with the debtor?

11 MR. GRAHAM: Your Honor, I always believe in triumph  
12 of hope over experience. We didn't -- we've made a lot of  
13 progress with the debtors in the last couple of weeks. We  
14 didn't make any progress for a long time. We're still far  
15 apart, but we are making progress.

16 THE COURT: Okay. All right. Thank you very much.

17 Let me come back to my question and make sure I  
18 understand -- and I understand the U.S. Trustee's objection.  
19 Has the balloting deadline passed? I'm totally --

20 MR. LEE: Yes, Your Honor, it has.

21 THE COURT: Okay. And so the solicitation materials  
22 went out with -- I guess remind me now. There was an  
23 opt-out -- no, I guess there was a statement that if you vote  
24 in favor of the plan, you agree to the --

25 MR. LEE: Correct.

1 THE COURT: -- release. So have you tried to define  
2 the universe of creditors who have voted against -- I'm just  
3 trying to understand -- if I don't today that's okay -- but  
4 when we get a little further along, not too much further along,  
5 I'd like to have -- I understand the U.S. Trustee has objected  
6 on this ground -- I'd like a better understanding of who are  
7 the remain -- who has voted against and preserved that argument  
8 with respect to the nondebtor release?

9 If you didn't vote against -- if you voted and you  
10 didn't vote against -- I mean, because I suppose if there was a  
11 class that didn't get to vote, it would be a different issue --  
12 but if you didn't vote against, the -- I think we had this  
13 discussion at the time of the disclosure statement that it's  
14 very strongly arguable that it's a consensual release. And so  
15 I would certainly hope that the U.S. Trustee would take that  
16 into account as well.

17 I mean, is -- so the issue is what non-consensual  
18 releases -- everybody who signed the PSA agreed, that's in the  
19 PSA, that there was going to be a release of Ally? It's built  
20 into the plan?

21 MR. LEE: And there have been thou -- I mean,  
22 thousands of claims have either been resolved, settled, or  
23 expunged. So I think -- I mean, I can't --

24 THE COURT: Okay.

25 MR. LEE: -- the people who've objected are the only



1 ones who would fit within the category of voting against the  
2 plan and preserving an argument against releases. But I'm not  
3 aware of any third-party litigation in which AFI or Ally is  
4 otherwise involved that's not now the subject of a resolution.  
5 And I think there's some issues relating to Wells, but --

6 THE COURT: Okay.

7 MR. LEE: -- that's a separate bank account --

8 THE COURT: Right.

9 MR. LEE: -- agreement which quite frankly, if we  
10 spent more than twenty seconds on it again in this case, I'd --  
11 whatever.

12 So --

13 THE COURT: Does somebody else want to be heard on  
14 this point? You want to just come on up quickly.

15 MR. DONNELL: Your Honor, Jim Donnell, D-O-N-N-E-L-L.  
16 Just for the record, for WFBNA. We have objected --

17 THE COURT: I'm sorry, who are you appearing on behalf  
18 of?

19 MR. DONNELL: WFBNA. It's Wachovia and Wells Fargo  
20 Bank. So we have an ongoing dispute with AFI we're trying to  
21 preserve our rights under for indemnity in our deposit  
22 agreement. We've objected to the third-party release, not so  
23 much on the basis for what the U.S. Trustee did, but for our  
24 particular agreement, we argue there is no indemnity right, so  
25 there's no basis for jurisdiction. And then we have other

1 arguments that we make for asserting that it's inappropriate to  
2 give the release.

3 THE COURT: Okay.

4 MR. DONNELL: Thank you.

5 THE COURT: Do you want to be heard? Come on up  
6 quickly.

7 MR. SCHAFFER: Your Honor, Eric Schaffer for Wells  
8 Fargo as collateral agent. The debtor has characterized our  
9 objection as relating to the junior secured noteholders. I  
10 think that's correct. But we have our own separate issues  
11 based on Wells Fargo's own claims.

12 THE COURT: Okay. Including with respect to the  
13 third-party release?

14 MR. SCHAFFER: Yes, Your Honor. We have raised  
15 questions with regard to the third-party releases, and I won't  
16 go into them now.

17 THE COURT: No, not necessary.

18 Okay, go ahead, Mr. Lee.

19 MR. LEE: So just staying on the subject of releases  
20 or at least moving to exculpation, the U.S. Trustee opposes the  
21 exculpation of non-estate fiduciaries, and we believe that's  
22 warranted here with respect to each of the exculpated parties,  
23 including non-estate fiduciaries. And we'll present that at  
24 confirmation. And then there's the question about the scope of  
25 the --

1 THE COURT: I guess, you'll present it. I'll hear it.  
2 The Second Circuit hasn't resolved it. The law elsewhere isn't  
3 too particularly favorable to you, but --

4 MR. LEE: So I may be misreading or reading into the  
5 General Maritime case, at least the notion that one can take  
6 out of that that "actions taken in connection or arising out  
7 of" language in there, if you have somebody vote in the  
8 formulation of a plan who's a non-estate fiduciary, the  
9 concept, I think would be to expand that. So we'll argue that  
10 at confirmation.

11 THE COURT: Was that an objection that was pressed at  
12 the General Maritime confirmation? I just don't remember.

13 MR. LEE: Your Honor, it --

14 THE COURT: You know, you have to be real careful  
15 about telling me what order I signed when it wasn't contested  
16 and when I've ruled on what is contested.

17 MR. LEE: Your Honor, that wasn't -- the question that  
18 was contested didn't go precisely to that issue. And the same  
19 was true in relation to Eastman Kodak. There were objections,  
20 and the language ultimately was incorporated into both of the  
21 plans. That's probably where we'll --

22 THE COURT: Okay.

23 MR. LEE: -- work from, Your Honor.

24 And then I think, Your Honor, there's the question  
25 about the scope or at least the vagueness of the exculpation

1 provision that the U.S. Trustee has raised. And we plan to  
2 make changes to the exculpation provision to have the normal  
3 language, clarifying the ability of the U.S. to enforce its  
4 police, regulatory, criminal, taxing powers. And we expect or  
5 at least hope that those modifications will resolve the U.S.  
6 Trustee's objection.

7 So with that, I think I'd, if I may, turn it over to  
8 Mr. Eckstein, unless Your Honor has any questions?

9 THE COURT: Well, are you going to go through the  
10 borrower objections?

11 MR. LEE: Yes, I'm happy to do that, Your Honor.

12 THE COURT: You can just go through them quickly.

13 MR. LEE: So the third bucket of unresolved objections  
14 were filed by borrowers. Your Honor, by and large, these  
15 filings don't appear to raise any objections to confirmation.  
16 It seems that they may have been submitted because borrowers  
17 didn't really fully understand the effect of confirmation on  
18 their claims. So what we've done is we've asked  
19 SilvermanAcampora to reach out to each of the borrowers to try  
20 and resolve their objections. Insofar as they actually relate  
21 to confirmation, we'll make that clearer to Your Honor. But as  
22 things currently stand, they don't appear to relate to  
23 confirmation.

24 And then the remaining objections by borrowers were  
25 filed by Wendy Nora, or are joinders to her objection. And we

1 don't anticipate a consensual --

2 THE COURT: I don't anticipate --

3 MR. LEE: -- resolution to that.

4 THE COURT: -- a consensual resolution to that.

5 MR. LEE: That, Your Honor, leaves five remaining  
6 objections, which seem to raise arguments specific, at least,  
7 to the objecting parties, which again, we'll try and resolve  
8 those prior to confirmation.

9 The first one relates to insurance neutrality that was  
10 filed by Lloyds and others. I believe counsel for WFBNA rose  
11 to make a point that I would have made. Hopefully we will  
12 resolve that objection. That relates to the closed deposit  
13 account that I think we've heard something about during the  
14 course of this case. And then I've described Flinn.

15 And I believe -- the only other one I'd like to note,  
16 Your Honor, is Deutsche Bank. We've resolved the effect of the  
17 judgment reduction provision, but there appears to be some  
18 additional arguments that are being made by Deutsche Bank that  
19 we hope, again, to resolve that language prior to confirmation.

20 THE COURT: Okay.

21 MR. LEE: Thank you, Your Honor.

22 THE COURT: Mr. Eckstein?

23 MR. ECKSTEIN: Your Honor, good afternoon. Kenneth  
24 Eckstein of Kramer Levin on behalf of the official creditors'  
25 committee. I have relatively little that I need to add to Mr.

1 Lee's presentation.

2 But just to step back. If Your Honor recalls, I think  
3 at the conclusion of the presentation of the evidence at the  
4 phase 1 trial, the suggestion of this conference, I think,  
5 arose. And it was really designed not to go into the merits of  
6 the issues. Obviously they're going to be presented in great  
7 detail in connection with confirmation. But it was really to  
8 aid the Court in trying to assess, as a practical matter, just  
9 what is and what is not left for the Court to have to consider,  
10 because I think Your Honor at the time had -- the objections  
11 had just come in. They did look quite voluminous. And the  
12 Court didn't have an opportunity at that point in time to  
13 really assess just the level of progress that had been made.

14 And I was hopeful that by today we'd be able to make  
15 this presentation. And in fact, I'm sure Your Honor has noted  
16 from Mr. Lee's presentation that, for example, the contested  
17 hearing that was scheduled for February -- November 15th, right  
18 now, for example, on Syncora, hopefully will not have to go  
19 forward, because we have been able to arrive at an agreement  
20 with Syncora that is being documented, and hopefully that will  
21 be concluded in short order.

22 Over the last just frankly two weeks, the FHFA issues  
23 have been resolved. These are major -- these were major  
24 hurdles that we'd all identified. At the disclosure statement,  
25 Your Honor had identified them. The co-defendants, as Mr. Lee

1 pointed out, were a major hurdle that have now been resolved  
2 consensually. And several of the borrower class actions, where  
3 there were very significant claims against AFI, have also been  
4 resolved. And while there'll obviously need to be a  
5 presentation on the third-party release and the exculpation, I  
6 think we all recognized, the Court made it clear from day one,  
7 the release and exculpation issues in this case were  
8 challenging. And they remain challenging.

9 But I think what Mr. Lee's presentation should provide  
10 some comfort to the Court, is that in fact, this case today --  
11 put the JSN issues to one side, because this is not about that  
12 discussion at the moment -- this case is now largely a case  
13 where there is substantial consent. And I think that -- from  
14 my perspective, I think that was the most important message to  
15 try to convey to the Court, that when the Court is going to be  
16 asked to consider a third-party release of this breadth and  
17 magnitude, which we all know, going into the plan, was an  
18 ambitious undertaking, in addition to being able to demonstrate  
19 the substantial contribution that was made, that I think was  
20 evident from the agreement that was reached in May, seemed to,  
21 from the way I was looking at this, we also had to bring to the  
22 Court the second prong, which was, is there, in fact,  
23 substantial consent.

24 And while Your Honor will obviously want to see the  
25 votes and I think Your Honor will be quite comfortable from the

1 voting, the practical reality is every lawsuit where there were  
2 third-party claims, both direct or indemnity co-defendant type  
3 claims, we believe today, have essentially been resolved. And  
4 that from the standpoint of the plan proponents that was, we  
5 though, the most valuable thing we could communicate to the  
6 Court in advance of confirmation is that to the extent there is  
7 going to be consensus around the third-party release, we  
8 believe that has been achieved.

9 Obviously there's a legal question Your Honor will  
10 have to answer in the third-party release and the exculpation.  
11 But when the U.S. Trustee looks at the third-party release and  
12 when the Court looks at the third-party release, we thought  
13 that it will go a great deal down the road, if the Court can  
14 look at it from the standpoint of having achieved a consensual  
15 third-party release, rather than a nonconsensual third-party  
16 release.

17 And to that end, that is the -- that's the significant  
18 new development that we can now present to the Court, which is  
19 that we'll go into confirmation and basically propose the  
20 approval of the release in the context of what we think is  
21 essentially going to be a consensual presentation.

22 And the fact is that while the JSN issues raise a lot  
23 of complexities and complications, at this point in time, all  
24 of the other confirmation issues, which are frankly of  
25 tremendous importance, and there are thousands and thousands of



1 categories of creditors that have significant interest in this  
2 case, each of whom could have credibly presented issues as  
3 complex as the JSNs. We could have had -- literally run  
4 through every category of creditor in this case, and we would  
5 have had hundreds of pages of findings of fact and conclusions  
6 of law dealing with each of the issues that could have been  
7 disputed. The reality is, those issues for the most part,  
8 today, are resolved. There are no substantial issues that  
9 remain open. There are a couple of isolated items. And  
10 hopefully we will get them resolved between now and  
11 confirmation.

12 But I think at this point in time, I would be able to  
13 characterize this plan, with the JSN issues to one side, as  
14 essentially a consensual confirmation. And we thought that was  
15 worth the Court hearing today with the detail that Mr. Lee laid  
16 out, rather than just saying it generally. But that, we  
17 thought, was a very significant development in the case that we  
18 really hadn't reached until now.

19 THE COURT: Okay. So, until today, I haven't  
20 established the trial procedures for the contested confirmation  
21 hearing: how long that hearing will last, et cetera. I  
22 certainly wanted to wait to get a better sense of what are the  
23 factual issues as to which the Court will have to hear  
24 evidence.

25 I know there's been depositions going on. Other

1 than -- let me ask you this, Mr. Eckstein or Mr. Lee: putting  
2 aside the issues with the JSNs, what other objection -- what  
3 other evidence do you anticipate offering during the  
4 confirmation hearing. As I think everybody should know by now,  
5 my practice is to require the written direct testimony with  
6 declarants present and available for cross-examination in  
7 court.

8           You know, you're going to make a showing under  
9 Metromedia. That's an evidentiary showing. It doesn't  
10 specifically refer to the JSNs. I don't know what other --  
11 somebody tell me what issues do you anticipate offering  
12 evidence? And I don't care whether Mr. Kerr or Mr. Lee or  
13 yourself address the issues.

14           MR. ECKSTEIN: Your Honor, Mr. Kerr was prepared to  
15 make a presentation as the second half of this status  
16 conference. He was going to make a presentation on --

17           THE COURT: Okay. I'll wait.

18           MR. ECKSTEIN: -- how we're going to proceed with the  
19 confirmation hearing. The short answer is that we have a  
20 comprehensive factual presentation that is going to come in --

21           THE COURT: Okay.

22           MR. ECKSTEIN: -- through declarations to support each  
23 of the elements of both 1129 and the elements of the global  
24 settlement.

25           THE COURT: All right. So let me first ask, is there

1 anybody else who -- before we get to that second half, is there  
2 anyone else who wishes to be heard with respect to objections  
3 or to the upcoming confirmation hearing?

4 MR. GRAHAM: Your Honor?

5 THE COURT: Yeah, please.

6 MR. GRAHAM: Good afternoon, Your Honor. Chris Graham  
7 again, from McKenna Long, for Impac Funding Corporation.

8 I came up earlier, Your Honor, to talk about the  
9 releases. That's actually part of our objection. I won't talk  
10 about that, because I think that's been covered ad nauseam. I  
11 will talk about the other part of our objection, which is 365,  
12 which, to make it very brief, Your Honor, I believe it's just  
13 eight words in Section 365(d) which requires an executory  
14 contract to be assumed by the debtor "at any time before the  
15 confirmation of a plan". Those eight words, Your Honor, make  
16 the plan unconfirmable and violative of 1129.

17 THE COURT: You know, there's -- I know those words  
18 are there, and I think in every case that I've had, that's gone  
19 to confirmation, where there have remained assumption disputes,  
20 the parties have agreed to carry the assumption issues, in  
21 part, because they want to see whether the plan gets confirmed,  
22 and reserving all their rights. And you're telling me that  
23 you're insisting that your assumption issue be resolved by the  
24 Court before confirmation. Is that what you're telling me?

25 MR. GRAHAM: Your Honor, I believe the debtors have

1 filed a motion to that effect.

2 THE COURT: Well, they can file their motions, but are  
3 you telling -- what's your position? Are you telling me that  
4 this issue of assumption, as to Impac, has to be resolved  
5 before the confirmation hearing?

6 MR. GRAHAM: I believe it does, Your Honor.

7 THE COURT: What's --

8 MR. GRAHAM: I think the law is clear on that.

9 THE COURT: I know what the Code says.

10 MR. GRAHAM: Right.

11 THE COURT: I also know the stipulation that's been  
12 reached in virtually every case I've had. In every big case,  
13 there are assumption issues which continue on after the  
14 confirmation hearing, because, A, the parties want to see is  
15 the plan really going to be confirmed. And then, I have to  
16 tell you, in every one of them where it's been deferred past  
17 confirmation, every one of them settled. I've never actually  
18 had to try one of them. But I know what the language of the  
19 Code is. I want to know what your position is, and then I'll  
20 ask Mr. Lee.

21 MR. GRAHAM: Sure. I mean, Your Honor, I think the  
22 reason why those stipulations typically get entered into is  
23 because the stipulations typically do not allow the debtor to  
24 have any type of leverage or, sort of, a get-out-of-jail-free  
25 card. The problem with --

1 THE COURT: I really just want to know the answer to  
2 my question.

3 MR. GRAHAM: Sure. The answer to your question, Your  
4 Honor, is if the plan is amended to take out the debtors'  
5 ability to change their mind about assumption and rejection  
6 post-confirmation, then yes, we can stipulate and we'll resolve  
7 it after the fact. But if we are going to stipulate to allow  
8 them to have more time to decide whether or not to assume or  
9 reject, and pay or not pay our cure amounts, then Your Honor,  
10 no, that's not a stipulation. Only a fool would recommend a  
11 client enter into that type of stipulation in a bankruptcy  
12 context, when the Code is clear. The Supreme Court, in  
13 Bildisco, which caused Congress to change the --

14 THE COURT: I know --

15 MR. GRAHAM: -- Bankruptcy Code --

16 THE COURT: Excuse me. I know what the law is.

17 MR. GRAHAM: Your Honor --

18 THE COURT: I also know what happens in virtually  
19 every case I've had before me where this issue has come up.  
20 You've stated your position.

21 MR. GRAHAM: Thank you, Your Honor.

22 THE COURT: What's your position, Mr. Lee?

23 MR. LEE: Your Honor, we've set this for a hearing on  
24 November the 15th. If we have to proceed with the hearing on  
25 the 15th, the question relates solely to one issue, Your Honor,

1 the amount of the cure claim; that's what this is about. This  
2 is just a question of how many dollars it's going to require to  
3 cure this contract. So we'll either resolve it before the  
4 15th, Your Honor, or if we have to go ahead --

5 THE COURT: Okay. Well, I've made it clear, your  
6 ability to resolve it on the 15th depends on whether I'm on  
7 jury duty on the 15th. I begin jury duty in state court in  
8 White Plains on the 12th. And we've moved the calendar to the  
9 15th, with the express understanding that I have to be here to  
10 be able to have a calendar. Okay. I would think the chances  
11 of my being on a jury in White Plains on the 15th is not  
12 particularly large, but you know --

13 MR. LEE: Your Honor, I was actually summoned --

14 THE COURT: -- out of my control.

15 MR. LEE: I was summoned for jury duty in White Plains  
16 at exactly the same time, and I've deferred it to February.

17 THE COURT: My problem is I've deferred before; I  
18 can't defer again.

19 MR. LEE: Four times, in this case, Your Honor.

20 If I may, Your Honor, should I turn it over to Mr.  
21 Kerr?

22 THE COURT: Yes.

23 MR. LEE: Thank you.

24 THE COURT: Well, just a second. Is the Impac  
25 assumption hearing going to require an evidentiary hearing?

1 MR. LEE: I believe it's scheduled for an evidentiary  
2 hearing, Your Honor.

3 THE COURT: And how many witnesses does the debtor  
4 intend to call?

5 MR. LEE: Your Honor, I don't know, as I stand here.

6 THE COURT: Well --

7 MR. LEE: I mean, I can check and find out before the  
8 end of this --

9 THE COURT: Okay.

10 MR. LEE: -- status conference.

11 THE COURT: So that we're all operating on the same  
12 page, I want all written direct testimony for the Impac hearing  
13 filed by noon on November 12th. That includes all exhibits.  
14 It's the debtors' motion, so debtor pre-marks all exhibits with  
15 numbers; Impac pre-marks all exhibits with letters. Any  
16 exhibits not -- so I want the direct testimony, I want all  
17 exhibits. Any exhibit not exchanged by the 12th will not be  
18 admitted in evidence at the hearing. I want -- do I have all  
19 the briefs with respect to this dispute, Mr. Lee?

20 MR. LEE: Not yet, Your Honor. We were supposed to  
21 file a reply, which we can get in as soon as Your Honor wants.

22 THE COURT: I certainly want it -- I think you ought  
23 to get it in by Friday the 8th, okay?

24 MR. LEE: That's fine, Your Honor.

25 THE COURT: This Friday. And so I want the full

1 package of exhibits, briefs, any stipulations, if you're able  
2 to agree on anything, everything by the 12th. And we have a  
3 very long calendar scheduled for the 15th. We'll see  
4 whether -- how much time do you think is going to be required  
5 for an evidentiary hearing, Mr. Lee?

6 MR. LEE: Your Honor, can I check --

7 THE COURT: Go ahead and confer.

8 MR. LEE: -- with the people around me?

9 THE COURT: Yeah, please.

10 MR. LEE: Thank you.

11 UNIDENTIFIED SPEAKER: Your Honor?

12 THE COURT: Go ahead and confer with Mr. Lee or his  
13 colleagues.

14 MR. LEE: Your Honor, I think probably two to three  
15 hours, at most, and hopefully even shorter.

16 THE COURT: All right. The evidentiary hearing is  
17 tentatively established for November 15th at 1:30 p.m. And as  
18 I said, I want everything by the 12th. And the only two things  
19 that would alter that schedule are an agreement by the parties  
20 to put it off post-confirmation, or me being on a jury or being  
21 in -- waiting to see what happens in White Plains. So -- okay.

22 MR. LEE: And a third possibility is we will get it  
23 resolved, Your Honor.

24 THE COURT: Well, yeah --

25 MR. LEE: We'll do our best.



1 THE COURT: -- that would be the best of all possible  
2 worlds.

3 MR. LEE: Thank you, Your Honor.

4 THE COURT: Okay. All right. Mr. Kerr?

5 MR. KERR: Good afternoon, Your Honor. Charles Kerr  
6 of Morrison & Foerster on behalf of the debtors.

7 Your Honor, we have been working extremely hard to  
8 prepare for the confirmation hearing starting on November 19th,  
9 as well as the phase 2 parts of the adversary proceeding. We  
10 have -- following Mr. Lee's approach, have been trying to both  
11 narrow the issues but narrow the procedural hurdles that we can  
12 get done beforehand, to make the presentation that we need to  
13 do on the 19th as straightforward and easy as possible.

14 That being said, there will be issues, we are going to  
15 be putting in submissions, and I wanted to go through the  
16 procedures that the parties are trying to agree to do. And I  
17 think -- I will say this, I think the parties have worked well  
18 together to try and get this -- we're still doing a lot of work  
19 and we have more work to do, but we have all been working hard  
20 at trying to make the presentation to Your Honor as  
21 straightforward as we can.

22 It has been somewhat of a unique process, only because  
23 there are going to be a confirmation hearing where we're  
24 putting on evidence to support the plan as well as evidence as  
25 part of the phase 2 issues, and melding those two different

1 proceedings into one has, as times, proved challenging. But I  
2 think we're doing it, and I want to explain how we plan to do  
3 it, if we can.

4           There is evidence that we are going to be submitting  
5 for plan confirmation that also potentially relates to the  
6 phase 2 issues, and a little back and forth as well. Our plan  
7 is, however, to kind of put our evidence in. In other words,  
8 come in and just put our evidence in, and not try to stage it  
9 or through some elaborate process, instead do it as efficiently  
10 as we can.

11           As provided for in Your Honor's August 23rd order, we  
12 will be submitting -- at least the plan proponents will be  
13 submitting a confirmation brief, a brief in support of  
14 confirmation, on November 12th. We will also be submitting an  
15 omnibus reply to any objections that are remaining. Hopefully,  
16 as Mr. Lee walked through with Your Honor, there's not a lot  
17 remaining, but there will be some, and we will be putting in an  
18 omnibus reply.

19           We've also been working hard with the JSNs to come up  
20 with a schedule by which to complete the pre-trial steps we  
21 need to do to give Your Honor the package that Your Honor  
22 expects and demands of counsel. And I think we have come up  
23 with that, on a fairly accelerated time schedule. Our hope is  
24 to submit that schedule to you, in a stipulated form, if not  
25 later today or tomorrow. And I'm willing to walk through all

1 of the elements of it. But it's really what goes on behind the  
2 scenes for counsel to complete depositions, get exhibits all  
3 set and whatever, so we can hand it to Your Honor.

4 But there are some things that we will be submitting  
5 to Your Honor that I wanted to walk through, and make sure that  
6 it's consistent with your expectations, and answer any  
7 questions I can. Under the schedule, we have agreed that if  
8 there are any motions in limine, and there may be one, it will  
9 be an omnibus motion of no more than twenty pages, and any  
10 reply will be an omnibus reply of no more than twenty pages.  
11 We are still doing depositions. We are still doing expert  
12 depositions, so there has been no final determination. I  
13 believe that the plan proponents will at least have one motion  
14 in limine, and I don't know yet whether the JSNs will or not.

15 Stepping back, Your Honor, for one thing. We have --  
16 and as I will explain when I get to the pre-trial order, we're  
17 trying to blend the procedures that go into plan confirmation  
18 with the procedures of the adversary proceeding. This motion  
19 in limine is likely -- I haven't differentiate -- sorry, I  
20 haven't differentiated it as with plan or not, but it deals  
21 with an expert that the JSNs have put forward.

22 With respect to exhibits, Your Honor, a couple of  
23 things. The parties have agreed, subject to Your Honor's  
24 approval, that any exhibits that were admitted into evidence in  
25 phase 1 will be deemed to be in evidence for phase 2. I'm not

1 sure they're all necessary for phase 2, but we're just -- it  
2 simplifies the process, we think, Your Honor. And to the  
3 extent we wanted to resubmit something, that seemed like a  
4 waste of Your Honor's time.

5 The debtors and the committee will be submitting a  
6 single exhibit list. That single exhibit list will list all of  
7 our exhibits for plan confirmation as well as any exhibits that  
8 we're going to be putting forward on phase 2. Again, our  
9 thought is having a single list to work from, without  
10 necessarily differentiating; it's just easier for Your Honor  
11 and I think easier for the parties.

12 With respect to the statement of issues to be tried,  
13 Your Honor, at the September 3rd conference on the discovery  
14 protocol that was put in place, Your Honor raised that issue  
15 and said you wanted a further clarification of that. We have  
16 had discussions with the JSNs; we pressed them for that. We  
17 are going to be exchanging, tomorrow, an element of a pre-trial  
18 order where they have told us that they will provide that  
19 detail. We spoke on the phone today. I think we have some  
20 sense of it. We hope to get that clearly tomorrow, exactly  
21 about what are the -- either the claims against AFI, for which  
22 they're asserting a lien on, or anything else. I'm hoping to  
23 find out tomorrow, Your Honor. If not, we'll be coming back to  
24 Your Honor and seeking that clarification --

25 THE COURT: All right.

1 MR. KERR: -- because it's something we need.

2 THE COURT: I mean, I think that -- and I commented at  
3 the end of the phase 1 evidentiary portion of the trial that  
4 despite the fact that the positions were very hard fought, I  
5 thought there was very good cooperation between the parties.  
6 The statement of issues to be tried, which was done  
7 considerably in advance of the phase 1 trial, was very helpful  
8 to me. And then so was the joint pre-trial order that fleshed  
9 out some of those issues. But it really helped the Court to  
10 move forward with trial. I understood, okay, here's what the  
11 issues are. There was some disagreement about whether any of  
12 the issues about liens on tort claims, things like that,  
13 whether that was part of phase 1 or not; I made clear no. So I  
14 do want -- I mean, I'm really looking forward to having a  
15 similar kind of document on the statement of issues again.

16 MR. KERR: And Your Honor, I think, as I will explain,  
17 and Mr. Cohen will explain as well, we are submitting a joint  
18 pre-trial order with respect to phase 2 issues, and I think --

19 THE COURT: Well, that may make it unnec -- if you're  
20 getting it all done into a joint pre-trial order, and that's  
21 got the statement of issues, I don't need a separate standing  
22 document. Put it that way.

23 MR. KERR: Okay.

24 THE COURT: Mr. Cohen, do you want to --

25 MR. COHEN: Your Honor, David Cohen, Milbank Tweed

1 Hadley & McCloy, on behalf of notes trustee and the JSN ad hoc  
2 group.

3 We have been working on the statement of issues.  
4 We've provided a draft to the debtors. They've asked for more  
5 specificity. And as Mr. Kerr explained, I think we're going to  
6 exchange that tomorrow. So we understand the Court's  
7 expectations, and we're working cooperatively to get that to  
8 you.

9 THE COURT: Thank you very much.

10 Go ahead, Mr. Kerr.

11 MR. KERR: Your Honor, as I said, we will be  
12 submitting a pre-trial order. And the way we look at the  
13 pre-trial order is it relates to the adversary proceeding --

14 THE COURT: Yes.

15 MR. KERR: -- not to the plan confirmation.

16 THE COURT: I agree.

17 MR. KERR: However, there will be -- there's element  
18 of the pre-trial order, such as the exhibit lists, which we'll  
19 just have our uniform exhibit list a part of, so it'll be a  
20 little bit of a mix, but --

21 THE COURT: Part of the reason that I did the  
22 phase 1/phase 2, combined phase 2 with confirmation, is it's  
23 the co-proponent's position that the global settlement, if  
24 approved, moots many of the issues that the JSNs otherwise wish  
25 to raise.

1 MR. KERR: That's correct, Your Honor.

2 THE COURT: So the issues clearly overlap, and that's  
3 why I wanted to do it together at one time. And there were  
4 obviously many other parties-in-interest who potentially would  
5 want to be heard about some of those issues. So that's why we  
6 were doing it in phase 2.

7 MR. KERR: Your Honor, we see it the same way, and  
8 that's what we've been working toward --

9 THE COURT: Okay.

10 MR. KERR: -- and working toward hard.

11 Your Honor, as you indicated, we are anticipating  
12 submitting written direct testimony by our witnesses that will  
13 run both to support plan confirmation, and to the extent  
14 necessary, phase 2 issues. We intend to submit all of that on  
15 November 12th. We are working very, very hard to complete the  
16 depositions to be able to get that all in by November 12th.

17 We have agreed between counsel -- working very hard on  
18 that, but we've agreed between counsel that there are -- just  
19 because of scheduling issues, there are three depositions, one  
20 fact deposition, and two expert depositions that we've agreed,  
21 subject to Your Honor's approval to have on the -- I think the  
22 fact deposition is the 13th, one expert on the 14th, one on the  
23 15th. And so to the extent there are any additional tweaks  
24 with the submissions we make -- for example, any written  
25 testimony by those witnesses, that will come in after that.

1 THE COURT: Okay.

2 MR. KERR: But we expect to have the vast majority of  
3 it in --

4 THE COURT: How many witnesses do the co-proponents  
5 expect to call?

6 MR. KERR: The co-proponents I'd add -- well, total --  
7 I had added it up before, Your Honor. Give me -- I believe  
8 that there are eighteen fact witnesses, and that includes the  
9 witnesses to -- I think there's five separate trustee witnesses  
10 that -- remember in the plan there is a request by the trustee  
11 to have certain findings in place, similar to the FGIC trial.  
12 They will be submitting testimony. I'm not sure anyone's going  
13 to cross-examine them or challenge them on --

14 THE COURT: That's in the eighteen?

15 MR. KERR: That's within the eighteen, Your Honor,  
16 yes. And those are fact witnesses. And then at least the  
17 proponents anticipate, at this point, six expert witnesses, for  
18 which we'll be putting in written declarations. Again, I  
19 expect that some of them will likely not be cross-examined.  
20 One of the things we're going to work out with the other side  
21 is to, prior to the actual trial, identify for each other which  
22 ones we expect to cross and not. However, all of our witnesses  
23 will be here, Your Honor. They'll be prepared to get up on the  
24 stand; if there's somebody else who has an issue with them,  
25 they will be here to be cross-examined.



1 THE COURT: There were other objections to  
2 confirmation that are not going to get resolved, and some of  
3 those parties are very capable of objecting to everything that  
4 happens and wanting to cross-examine every witness that -- I  
5 mean, I --

6 MR. KERR: And we understand that, Your Honor. And  
7 Your Honor, we -- from our perspective, Your Honor, we believe  
8 that we're going to put on evidence to support the plan, but we  
9 feel strongly that --

10 THE COURT: Okay.

11 MR. KERR: -- objectors should have a fair opportunity  
12 to raise their objections.

13 THE COURT: They will.

14 MR. KERR: And we'll make our witnesses available.

15 THE COURT: They will have a fair opportunity.

16 MR. KERR: Okay.

17 THE COURT: On the other hand, let me just say right  
18 now that everybody will have a fair opportunity, but I control  
19 witness examination closely. If I believe questions are not  
20 relevant to the issues before me, I cut it off. And if any  
21 party cross-examining a witness abuses -- attempts to abuse the  
22 rulings that I reach, they will sit down.

23 MR. KERR: Your Honor, that -- in connection with that  
24 submission, we have actually one question I just wanted to  
25 raise, Your Honor. Again, because we're an amalgam of plan

1 confirmation and an adversary proceeding, where frankly, some  
2 of the issues are being presented as counterclaims by the JSNs,  
3 there are certain issues that will come, potentially, as  
4 rebuttal. And the question is, is whether or not Your Honor  
5 wants prospective rebuttal testimony after the JSNs put their  
6 testimony on, or in written form beforehand? Or how would Your  
7 Honor like to handle that?

8 THE COURT: I would like for you and Mr. Cohen, or  
9 whoever the relevant attorneys are, to try and discuss it. I  
10 don't -- because this is a bench hearing, I often don't stand  
11 on ceremony about whether something is cross, redirect,  
12 rebuttal. I prefer to have the evidence, even if it's  
13 anticipating issues, if you can agree -- hopefully you can --  
14 so that it all comes in in piece. I don't know if that's  
15 helpful to you, Mr. Kerr. Mr. Cohen's shaking his head. But  
16 obviously me saying it and you agreeing -- if the parties can't  
17 agree, we'll proceed in the way the rules require.

18 MR. KERR: Okay.

19 THE COURT: Okay.

20 MR. COHEN: We understand the Court's direction.

21 THE COURT: Okay. I mean --

22 MR. KERR: We do too, Your Honor.

23 THE COURT: But you'll -- if it comes in in a cohesive  
24 fashion from each side, it has more impact than when it all  
25 gets broken up, okay?

1 MR. COHEN: We agree, Your Honor.

2 MR. KERR: Your Honor, with respect to deposition  
3 designations --

4 THE COURT: Yes.

5 MR. KERR: -- we are working hard, as the depositions  
6 go, to designate, and we've set up a schedule to  
7 cross-designate as well. Again, because we will be -- I think  
8 we have four scheduled for Friday, we have four for Monday, we  
9 have a couple afterwards. We'll be getting you the  
10 designations as quickly as we can. We may not have all of them  
11 by the 12th. But we will work -- we're working very hard to  
12 get you them as quick as we can.

13 The form that we were going to submit them in, Your  
14 Honor, was actually the form I believe we used in the FGIC  
15 trial, which would be just listing by page and number, unless  
16 Your Honor would also like a color-coded copy --

17 THE COURT: I would.

18 MR. KERR: -- of the transcript.

19 THE COURT: I would like --

20 MR. KERR: We'll make that --

21 THE COURT: I'd like both.

22 MR. KERR: -- available to you.

23 THE COURT: And I think what happened in the phase 1  
24 trial is that the -- I don't know, it was some time after the  
25 conclusion of the evidence that I got a single list of

1 designations, counterdesignations. There were only a few  
2 obj -- I think maybe the objec -- either the objections were  
3 all resolved or there were just a few objections. The parties  
4 were able to resolve objections to the deposition designations  
5 and counterdesignations. So whether I get it -- the sooner I  
6 get that combined list the better, but by the time the evidence  
7 ends at the hearing, I'd like to get a combined -- a single  
8 list that shows the designations, counterdesignations, and any  
9 remaining objections.

10 MR. KERR: We will work to accomplish that, Your  
11 Honor.

12 THE COURT: Okay.

13 MR. KERR: We'll make sure that happens.

14 THE COURT: All right. May I interrupt you at this  
15 point?

16 Mr. Cohen, Mr. Kerr has told me how many fact and  
17 expert witnesses he anticipates. Can you tell me how many the  
18 JSNs anticipate?

19 MR. COHEN: It's a little difficult to answer the  
20 question with precision because we're still taking --

21 THE COURT: Yes --

22 MR. COHEN: -- fact depositions.

23 THE COURT: -- I understand.

24 MR. COHEN: We know that we have three experts that we  
25 will be putting on, and I would expect that there will probably

1 be somewhere between five to seven fact witnesses --

2 THE COURT: Okay. I'm not holding --

3 MR. COHEN: -- although I need some latitude.

4 THE COURT: I'm not holding you to the number now; I'm  
5 just trying to get a sense.

6 MR. COHEN: Yeah, so at least three; I would say -- my  
7 current thinking is between seven to ten total.

8 THE COURT: Okay.

9 MR. COHEN: Thank you.

10 THE COURT: And those are distinct from the  
11 twenty-four fact and expert witnesses that Mr. Kerr has  
12 listed -- has identified?

13 MR. COHEN: Does your six include my three?

14 MR. KERR: It does not.

15 MR. COHEN: Okay. So they are.

16 MR. KERR: At least not as to experts, Your Honor.

17 MR. COHEN: Right.

18 THE COURT: Okay. Go ahead, Mr. Kerr.

19 MR. KERR: Again, Your Honor, I must say, I'm not  
20 clear to me whether or not the JSN's approach is to call AFI  
21 witnesses or -- I'm not quite sure which witnesses they're  
22 calling as fact witnesses. And I'm willing to speak to speak  
23 with Mr. Cohen about that afterwards, but that's a little news  
24 to me, I guess.

25 THE COURT: Okay. Well, is AFI intending to call

1 witnesses at the confirmation hearing?

2 MR. DONOVAN: There will be witnesses --

3 THE COURT: You have to identify yourself.

4 MR. DONOVAN: Oh, I'm sorry. Daniel Donovan, Kirkland  
5 & Ellis for Ally.

6 There are two witnesses. They're included, I believe,  
7 in Mr. Kerr's count.

8 THE COURT: Two fact witnesses?

9 MR. DONOVAN: Yes, Your Honor.

10 THE COURT: Okay. Thank you, Mr. Donovan.

11 MR. KERR: Yeah, let me just check, Your Honor. They  
12 are not included in mine.

13 MR. DONOVAN: Oh, they're not.

14 THE COURT: Okay.

15 MR. DONOVAN: Excuse me, they're not, Your Honor.

16 THE COURT: All right.

17 MR. DONOVAN: And one -- just to give you some -- one  
18 will probably just be for the jurisdiction; I don't even think  
19 anyone's going to cross him on insurance. But he'll be  
20 available, just to give you some timing.

21 THE COURT: Okay. All right. Go ahead, Mr. Kerr.

22 MR. KERR: Your Honor, maybe this will get covered,  
23 but to the extent there are going to be adverse witnesses  
24 called, I obviously need to do scheduling. So that'll be  
25 something I will need to work out with --

1 THE COURT: Yeah, so what I want to happen is that the  
2 parties identify -- obviously the co-proponents will go first.  
3 But the parties need to identify the order of witnesses --

4 MR. KERR: Um-hum.

5 THE COURT: -- so that -- because there's frequently a  
6 shifting cast of characters, who's going to do the  
7 cross-examination. So I think it worked reasonably well in the  
8 phase 1 trial. People -- and I'm willing to take witnesses out  
9 of order, if that becomes necessary. And people, I think, were  
10 reasonably good about giving an estimate of how long they  
11 thought they would be with cross-examination. I expect  
12 courtesies to be -- and I don't have any doubt that that'll  
13 happen, okay? The courtesies will be extended, so we don't  
14 have any gaps, and witnesses are there ready to go on.  
15 Sometimes you get surprised; you put a witness statement in and  
16 nobody's got any cross-examination. Make sure you've got a  
17 bunch of witnesses lined up to go.

18 Mr. Cohen?

19 MR. COHEN: The draft stipulation, that we hope to  
20 file today or tomorrow, contemplates all of that.

21 THE COURT: Okay. That's fine.

22 MR. COHEN: We've been working very well together.

23 THE COURT: It worked well during the phase 1 trial.  
24 I don't have any doubt that you'll be able to work it out here.

25 MR. KERR: Mr. Cohen's correct. We've already built

1 that into --

2 THE COURT: Okay.

3 MR. KERR: -- our schedule, Your Honor.

4 THE COURT: That's fine. All right.

5 MR. KERR: Your Honor, we have --

6 THE COURT: Before you go on, is there anybody else in  
7 the courtroom, representing any parties-in-interest, who  
8 anticipates calling witnesses at the hearing that haven't been  
9 identified either by Mr. Kerr, Mr. Cohen, or Mr. Donovan?

10 MR. SCHAFFER: Your Honor, Eric Schaffer for Wells  
11 Fargo, as collateral agent.

12 We may have one witness. We would be happy to reach  
13 out to the others, and perhaps this can be stipulated. I don't  
14 think it would be very long.

15 THE COURT: Okay. Anybody else in the courtroom who  
16 anticipates calling any fact or expert witnesses at the  
17 confirmation hearing?

18 MR. KERR: Your Honor -- oh, I'm sorry.

19 MR. DONNELL: Sorry, Your Honor. Jim Donnell for WFB,  
20 N.A. again.

21 I don't anticipate that we have any disputed facts,  
22 but I need to work with counsel. So at most, I would have a  
23 couple of minutes of questions for the witness. Thank you.

24 THE COURT: Okay. Well, you may have questions for a  
25 witness, and I hope you'll be able to stipulate. My question



1 is really is there anybody you intend to call that no one else  
2 is going to call as a witness?

3 MR. DONNELL: I would simply establish the documents  
4 through the AFI or the debtor witness --

5 THE COURT: Okay.

6 MR. DONNELL: -- as direct. Thank you.

7 THE COURT: All right. Anybody else?

8 MR. KERR: Your Honor, just -- one point I want to  
9 make, Your Honor. Among my -- the list of witnesses I included  
10 was I expect at least one witness on behalf of the steering  
11 committee as well, in support of their application. So --

12 THE COURT: But you included that in your --

13 MR. KERR: I've included that in the eighteen, Your  
14 Honor.

15 THE COURT: Okay.

16 MR. KERR: Yes.

17 THE COURT: All right.

18 MR. KERR: Your Honor, we were scheduled for six days  
19 of hearings, starting on the 19th, going to November 26th.  
20 Again, we spent time, internally, talking about whether or not  
21 we can accomplish all of this in those six days. That,  
22 frankly, has to do a lot with which of our witnesses are  
23 cross-examined. Again, the ones that are strictly on plan  
24 confirmation we don't assume --

25 THE COURT: So I assume everybody knows, six-hour

1 trial days. We start at 9 a.m. and we have to end at 5 a.m.  
2 (sic).

3 MR. KERR: Right. We're --

4 THE COURT: 5 p.m., excuse me.

5 MR. KERR: We're aware of that, Your Honor.

6 THE COURT: Okay.

7 MR. KERR: And I will say that we'll work as hard as  
8 we can to get the evidence up and on and off as quick as we  
9 can. But we still have to work through some remaining issues.  
10 And again, because depositions are still going on, and it  
11 sounds like the JSNs aren't sure how many witnesses they may  
12 choose to call, whether adverse witnesses or not, I just -- I  
13 have to -- I'll have to see how that goes, going forward.

14 As Your Honor indicated, we would expect to put up our  
15 witnesses first and the plan proponent witnesses. We will  
16 intend to put on all of our witnesses; we're not going to try  
17 to sequence them out. I think our plan is to put them all up,  
18 even if they are phase 2 witnesses or plan confirmation, and  
19 even if whether they are, arguably, in part, rebuttal. But  
20 there may be other rebuttal witnesses that we hear once we hear  
21 the JSN's proof.

22 THE COURT: I would just say if -- particularly with  
23 the Thanksgiving holiday, very quickly after you're -- we're  
24 not hearing evidence on the 27th; let me make that clear.

25 MR. KERR: I understand that, Your Honor.

1 THE COURT: And I don't even want to contemplate  
2 having to resume sometime after Thanksgiving. But looking at  
3 my calendar, the earliest we would resume is Thursday, December  
4 5th and the 6th, because I have -- I mean, I've got a really  
5 heavy docket. Just everybody understand that. So work to get  
6 this done in the time, okay? I mean, the 2nd I've got morning  
7 and afternoon calendars. The 3rd I've got a morning calendar.  
8 The 4th and the 5th are open.

9 MR. KERR: Is it the 4th and the 5th or the 5th and  
10 6th, Your Honor?

11 THE COURT: I'm sorry, 5th and 6th; I apologize --

12 MR. KERR: Right.

13 THE COURT: -- Mr. Kerr, 5th and 6th. 5th was the  
14 ResCap day, and the 6th is open.

15 MR. KERR: So Your Honor, my only other --

16 THE COURT: I get really cranky if people don't finish  
17 in the time that --

18 MR. KERR: Your Honor, I will --

19 THE COURT: -- they've indicated.

20 MR. KERR: For personal reasons, that I'm sure Mr.  
21 Cohen shares, our families get crankier than you could possibly  
22 ever get if we don't finish on time.

23 THE COURT: Do you want to trade?

24 MR. KERR: No. You know something? You haven't met  
25 my wife. No, I would not trade, Your Honor. I would not

1 trade. I didn't say it on the record.

2 MR. COHEN: And Your Honor, you would be cranky during  
3 their rebuttal case --

4 MR. KERR: Yes.

5 MR. COHEN: -- which would be fine with us.

6 THE COURT: Yeah.

7 MR. KERR: Your Honor, the only thing I actually --  
8 the final thing I wanted to raise is I think -- we are all  
9 working very hard to get this thing ready, but I think it'd be  
10 very helpful to have another status conference. We were going  
11 to propose either November 14th, which would be two days after  
12 we get all the submissions in, if that works for Your Honor.

13 THE COURT: Assuming I'm not on jury duty.

14 MR. KERR: If you're not -- assuming you're not -- we  
15 could all schlep up to White Plains, I guess, and do it up  
16 there. But assuming you're not on jury duty, that's what we  
17 would suggest.

18 THE COURT: All right. So let's set a status  
19 conference, pre-trial status conference for November 14th at 2  
20 o'clock.

21 MR. KERR: And Your Honor, I indicated I -- there will  
22 be some people who are in this courtroom now who will be in a  
23 deposition that day. So we'll be here, and we thank you very  
24 much for setting that time.

25 I don't have anything further. I don't know if Mr.

1 Cohen's got anything else.

2 THE COURT: Mr. Cohen?

3 MR. COHEN: No, Your Honor. Thank you.

4 THE COURT: You could probably track Judge Peck down  
5 if you wanted to go back to mediation for a few days here, but  
6 for whatever that's worth.

7 Okay. In terms of -- you thought you'd have a  
8 stipulation with these procedures.

9 MR. KERR: Yeah, Your Honor, let me tell you where it  
10 stands. We have worked out a schedule. We have exchanged  
11 drafts. There was -- we got back a draft early this morning  
12 that had a tweak on it that we just -- we haven't had a chance  
13 to speak to the JSNs about. Subject to getting that cleared  
14 up, Your Honor, we will, I think, be pretty close to being able  
15 to submit it today. And really what it does, Your Honor, it  
16 does nothing -- we are following the time schedule in the  
17 stipulation, so we are all working very hard to do that. This  
18 simply just gives everybody the assurance that it fits Your  
19 Honor's schedule as well. But I think our goal, and the  
20 stipulation is leading up to having all of our submissions,  
21 exhibits, witness statements, and the briefing on November  
22 12th, which is seven days before the start of this hearing. So  
23 that's what we've been working toward, and that's what we're  
24 trying to do.

25 THE COURT: All right. Have you built into the

1 schedule proposed findings of fact and conclusions of law?

2 MR. KERR: We have -- we have, within the extent,  
3 within the pre-trial order, to the extent there's any, that  
4 will be in the pre-trial order. With respect to any  
5 pre-trial -- any --

6 THE COURT: Well, I'm talking about even confirmation  
7 issues. I mean, you're --

8 MR. KERR: We have not, Your Honor, at this point.

9 THE COURT: Mr. Eckstein?

10 MR. ECKSTEIN: Your Honor, I think we had assumed that  
11 there would be post-trial submissions of findings of fact and  
12 conclusions of law. How quickly those can be submitted, I  
13 think still remains to be seen, but I'm assuming, similar to  
14 phase 1 we're going to have those --

15 THE COURT: Are you going to have a daily transcript  
16 during the confirmation?

17 MR. ECKSTEIN: I'm sure we'll have a daily transcript.

18 THE COURT: Okay. Mr. Masumoto, is the U.S. Trustee  
19 going to call any witnesses?

20 MR. MASUMOTO: We don't plan to at this time, Your  
21 Honor.

22 THE COURT: Okay.

23 MR. KERR: Your Honor, I guess one question that we  
24 would have. To the extent -- is Your Honor -- if we go through  
25 plan confirmation, is Your Honor going to need or expect

1 post-hearing findings of fact and conclusions of law?

2 THE COURT: Probably will. I mean, I just -- I'm  
3 right now focusing on the phase 2 issues because -- yeah, I do.

4 MR. ECKSTEIN: Your Honor, just one additional  
5 amendment that we can maybe visit again on the 14th, and that  
6 is in contrast to the phase 1, this hearing will be preceded by  
7 really fully briefed confirmation objections and briefs in  
8 support of confirmation, which the Court didn't have on phase  
9 1. So to that extent, it may reduce what is needed post-trial.  
10 You may still need some collection of the evidence, but the  
11 briefing will have been, I think, done. I'm not sure there  
12 will be a need to repeat the briefing.

13 THE COURT: No, the briefing may not; findings of fact  
14 may well be. I mean, with the issues with the JSNs,  
15 ultimately, are they oversecured or are they undersecured.  
16 We'll see where they come out after phase 1. If they come out  
17 oversecured after phase 1, you all ought to do everything you  
18 can to resolve any remaining issues with the JSNs. I'm going  
19 to hear closing argument on Wednesday. And if they wind up  
20 undersecured after phase 1, they're going to fight like tigers  
21 when it comes to phase 2, and they're entitled to.

22 MR. ECKSTEIN: Absolutely.

23 THE COURT: Okay?

24 MR. COHEN: Your Honor, I just wanted to be clear  
25 about the stip that we'll file either later today or tomorrow.

1 That deals with the pre-trial filings with respect to phase 2  
2 and not the confirmation issues?

3 THE COURT: Yeah.

4 MR. COHEN: Even --

5 THE COURT: No, I understood that.

6 MR. COHEN: Okay. Thank you.

7 THE COURT: I understood that. Okay. Anything else  
8 anybody wishes to raise?

9 Okay. We're adjourned.

10 MR. KERR: Thank you, Your Honor.

11 THE COURT: Thanks very much.

12 Let me -- before you all leave, let me just ask this.  
13 Mr. Lee, you ought to -- your chart's very helpful. Has it  
14 been filed on ECF?

15 MR. LEE: No, Your Honor.

16 THE COURT: You ought to file it on ECF.

17 MR. LEE: Yes, Your Honor.

18 THE COURT: And if there are updates to it, you --  
19 well, first, I mean, it's -- my law clerks don't talk about the  
20 substance of any of the pending matters with any of the  
21 counsel, but to the extent that you think any other objections  
22 are likely, even if they're not finally resolved, advise my  
23 clerks because it -- this is very helpful because it affects  
24 what we have to do to prepare. And so if you reach finality on  
25 some of those where you think you have an agreement in



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1 principal, and stuff like that, let us know. Okay?

2 MR. LEE: We will do, Your Honor.

3 THE COURT: Thank you very much.

4 (Whereupon these proceedings were concluded at 3:47 PM)

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

*Penina Wolicki*

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PENINA WOLICKI

AAERT Certified Electronic Transcriber CET\*\*D-569

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Date: November 5, 2013